

From: Darrell.Early@deg.idaho.gov
To: [Weber, Courtney](#)
Cc: mary.anne.nelson@deg.idaho.gov; [Burgess, Karen](#); Douglas.Conde@deg.idaho.gov; Barry.Burnell@deg.idaho.gov; [Lidgard, Michael](#); [Kenknight, Jeff](#); [Martich, Tara](#)
Subject: RE: IPDES -- Citations
Date: Tuesday, July 26, 2016 7:55:24 AM

Thanks Courtney,

Doug and I were discussing this issue this morning and he pointed me to the note immediately following 40 CFR 123.27(3) highlighted below. While I recognize and appreciate that the cases cited by the Office of Criminal Enforcement hold that CWA penalties can be assessed for ordinary negligence, it would seem that EPA's promulgated criteria for program approval indicate that a higher criminal negligence standard is acceptable.

- 3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows:
- (i) Civil penalties shall be recoverable for the violation of any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or, any regulation or orders issued by the State Director. These penalties shall be assessable in at least the amount of \$5,000 a day for each violation.
 - (ii) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of \$10,000 a day for each violation.

Note: States which provide the criminal remedies based on "criminal negligence," "gross negligence" or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section.

40 CFR § 123.27(a)(3)(ii) (emphasis added).

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ATTORNEY CLIENT PRIVILEGED COMMUNICATION – CONFIDENTIAL –

From: Weber, Courtney [mailto:Weber.Courtney@epa.gov]

Sent: Friday, July 22, 2016 4:04 PM

To: Darrell Early

Cc: Mary Anne Nelson; Burgess, Karen; Douglas Conde; Barry Burnell; Lidgard, Michael; Kenknight, Jeff; Martich, Tara

Subject: IPDES -- Citations

Hi Darrell:

I think it would be a good idea to have a broader discussion on how EPA makes the distinction between criminal v. civil enforcement when we get the larger enforcement meeting together. For civil enforcement, the standard is strict liability; however, in terms of what we can assess as a penalty, there are some big differences (e.g., criminal has a minimum penalty amount and jail time) that weigh into whether we bring a civil case or a criminal case. How that rolls over to the State's authorities and decision on when to take a criminal v. civil case is something that we should discuss.

I was able to obtain the citations to the legislative history and case law for you. The CWA legislative history is from the house debate where the negligence standard was discussed. It is attached (citation is 118 Cong. Rec. 10,644 (1972)). There are 3 federal cases where the CWA's ordinary negligence standard was litigated in federal circuit courts. They are: *U.S. v Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *U.S. v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005), and *U.S. v. Pruett*, 631 F.3d 232 (5th Cir. 2102). All courts found the CWA standard to be simple or ordinary negligence.

Let me know if you want to discuss further, etc.

--Courtney

From: Darrell.Early@deq.idaho.gov [mailto:Darrell.Early@deq.idaho.gov]

Sent: Thursday, July 21, 2016 3:24 PM

To: Weber, Courtney <Weber.Courtney@epa.gov>

Cc: mary.anne.nelson@deq.idaho.gov; Burgess, Karen <Burgess.Karen@epa.gov>;

Douglas.Conde@deq.idaho.gov; Barry.Burnell@deq.idaho.gov

Subject: RE: IPDEQ negligence standard

Thanks, Courtney. I look forward to getting a more complete understanding of EPA's position.

I have been reading the Idaho case law in this area. It seems the cases are concerned with how the Courts and prosecutors should distinguish between actions that are criminal versus actions giving rise to common law torts. For example the *McMahon* case you provided was drawing the distinction between the crime of manslaughter vs. wrongful death each of which arise when someone

negligently causes the death of another human being. See likewise, *State v. Hintz* 61 Idaho 411 (manslaughter charge brought to negligently leaving a disabled vehicle obstructing a roadway). In *State v. Patterson*, 60 Idaho 67 (1939) the charges were assault and battery. It seems that in this context it is an entirely appropriate jurisprudential concern. When is something a crime versus when is it a civil matter? If all torts were crimes and all crimes were torts it would provide unfettered discretion to prosecutors to charge a crime in one case and not in another.

The Idaho case law could be distinguished on the basis that the cases involve scenarios where there is an analogous common-law tort remedy that is being distinguished for purposes of charging criminal conduct. However, under the clean water act we have a civil/administrative remedy for the same actions that can give rise to a criminal penalty which seems to put us into the same jurisprudential quandary. I.e. When is something a crime versus a civil case.

Thus, one question that I think we need better understanding of from EPA's perspective is: If ordinary negligence is to be the criminal standard, how do we distinguish when to bring a criminal case vs. a civil?

I have been to presentations by EPA CID and the USAO on how they select environmental cases for criminal prosecution, the factors they use lean heavily towards a gross negligence/wanton/willful, standard. They also focus on acts of deception and motivation (i.e. profit). Finally, I know that they weigh the egregiousness of environmental harm from the violation into the equation. But in my experience, I have not seen examples where the USAO has brought a criminal case for ordinary negligence (even if that is the legally recognized standard under the law).

So at the end of the day I think Idaho will need to understand at least to some measure how to distinguish when something is criminal conduct versus that which subjects a person to civil liability so that we can clearly explain this issue to the DEQ director, and if necessary for program approval the Idaho legislature.

I look forward to continuing this interesting discussion.

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ATTORNEY CLIENT PRIVILEGED COMMUNICATION – CONFIDENTIAL –

From: Weber, Courtney [<mailto:Weber.Courtney@epa.gov>]

Sent: Thursday, July 21, 2016 3:30 PM
To: Darrell Early
Cc: Mary Anne Nelson; Burgess, Karen
Subject: IPDEQ negligence standard

Hi Darrell:

I just wanted to give you an update on this. I has requested the specific legislative history cites, etc. from our HQ office and I'm waiting for their response. As soon as I get it, I will email the cites to you.

Thanks!

--Courtney

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